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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

JESSE HOSKINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Jesse Hoskins, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

Judgment and Opinion of the Court Below

On February 7, 1969 the Court of Appeals for the Seventh Circuit denied a petition for re-hearing of its order entered on January 8, 1969 affirming the judgment of the District Court. The Opinion is not reported, but is appended hereto as Appendix A. The order denying a re-hearing is appended hereto as Appendix B.

Jurisdictional Statement

The jurisdiction of this Court is invoked under Title 28, U.S. Code, Sec. 1254(1).

Questions Presented for Review

1. Is Section 174, Title 21, U.S. Code, unconstitutional?

2. Is a federal statute, which requires as a defense thereto, an admission to a felony under state law, in violation of defendant's constitutional right against self-incrimination?

3. Where counsel is appointed to represent defendant less than 24 hours prior to trial and fails sufficiently to confer with his client and fails to make appropriate motions and objections, is appointed counsel less than an advocate, thereby denying defendant effective assistance of counsel?

4. Should the court as part of its supervisory powers over the federal courts, set definite time guidelines with regard to how long prior to trial counsel should be appointed for the indigent defendant?

5. Is defendant's constitutional right to a fair trial violated when the jury is informed that defendant, at the time of his arrest, was under indictment for a narcotics violation other than the narcotics violation for which defendant is being tried?

6. In order for the government to present evidence of other crimes under the exception that evidence is admissible when it is so blended or connected with the one on trial that proof of one incidently involves proof of the other, must the government demonstrate beyond all reasonable doubt, that such prejudicial evidence is so blended with the evidence essential to the cause on trial?

7. Is an instruction which informs the jury that the government need not prove either that narcotics were imported or that defendant knew they were imported, but that defendant must explain his possession, improper in that it shifts the burden to defendant?

8. Is defendant's constitutional right to face his accuser violated when the trial court sustains an objection to an inquiry of a witness as to whether there exists reports which would be available to defendant under Section 3500, Title 18, U. S. Code?

Constitutional Amendments and Statutes Involved

Fifth Amendment, U. S. Constitution.

Sixth Amendment, U. S. Constitution.

Sec. 3500, Title 18, U. S. Code.

Sec. 174, Title 21, U. S. Code.

Amendment V—U. S. Constitution:

> "No person shall . . . be compelled in any criminal case to be a witness against himself. . . ."

Amendment VI—U. S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Title 18—United States Code:

> Section 3500. Demands for production of statements and reports of witnesses.
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government

shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

Title 21—United States Code:

Section 174.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Statement of Facts

Federal narcotic agent Carl Jackson testified that on October 18, 1967 at about 6:00 P.M. he, together with other agents, were on the south side of Chicago at 82nd and Peoria Streets, and there saw the defendant's car turn into an alley and park in the rear of defendant's home at 8211 Peoria Street. There was a warrant on file for the arrest of the defendant. As the agents approached defendant's car, Jackson stated he saw the defendant reach underneath the car and appear to place something under the seat. (Tr. 8)[1] The agent went to the car, opened the

[1] "Tr." refers to the Transcript of Proceedings.

doors, asked the defendant to get out of the car and then placed him under arrest. (Tr. 8)

While Hoskins was out of the car under arrest, Jackson asked what the defendant had placed under the seat and defendant replied that he put nothing there. The witness then reached under the seat and recovered a small manila envelope containing white powder. (Tr. 9)

The white powder was removed from the manila envelope, put in a substitute glassine bag which he initialed, then was put in a lockseal envelope and put in a locker at the Bureau of Narcotics until October 20, 1967 when he delivered it to the U.S. chemist. (Tr. 11)

On cross examination agent Jackson testified that it was dark outside and he was not able to see either of the defendant's hands, although he noticed the defendant make a motion reaching underneath the seat when the car was brought to a stop. (Tr. 32, 33)

Narcotic agent Richard Smith testified he was with Jackson at the time when Hoskins was getting out of the car. He heard agent Jackson remove a 3x5 manila envelope from under the front seat on the driver's side. (Tr. 58) The defendant denied any knowledge of the existence of any envelope under the front seat. (Tr. 70).

A stipulation was entered that a government chemist examined the contents of Gov't Exhibit 5 and found it to contain 23.775 grams of heroin, a narcotic drug.

Evidence on behalf of the defendant.

The secretary to the U. S. Commissioner testified that there was no complaint or proceeding brought before the Commissioner under the name Jesse Hoskins in October, 1967. (Tr. 77)

Mrs. Joanne Hoskins, wife of the defendant, testified that agents had knocked on her door at 8211 Peoria Street during the afternoon of October 18, 1967 asking for her husband. She saw some men in an automobile in front of her home periodically through the day. When she went to the grocery store and returned to the garage in the rear of her home, three men drove up behind her, one of whom knocked on her door earlier. (Tr. 82) She spoke with her husband who called her on the telephone that evening at about 5:15 P.M. (Tr. 83)

The defendant testified on his own behalf that he lived at 8311 South Peoria Street, Chicago with his wife and two children and was 48 years of age. Pursuant to a telephone conversation he had with his wife on October 18, 1967, his attention was called to agent Jackson's car because his wife had previously told him on the telephone about the police. (Tr. 90) When agent Jackson pulled up behind his car in the alley at 82nd Street between Peoria and Green Streets, Jackson put his gun on the defendant. Before Jackson approached the car, the defendant did not bend over in any manner nor did he place anything under the seat of his car. Although Jackson told him he was under arrest, Jackson did not state the reason for his arrest. (Tr. 97) Jackson did not pull any bag out of the car in his presence; but told agent Karstan to drive the car downtown. (Tr. 97-99) When the defendant was brought downtown he was still not told that he was being held for possession of narcotics. (Tr. 100) Agent Pringle finally told him he was arrested on a conspiracy charge.[2] He was released the next day on bail on the conspiracy charge only. (Tr. 101)

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[2] Petitioner was the only one amongst a large number of defendants acquitted of this charge by a jury on December 24, 1968, in the District Court in Chicago.

He did not have Government Exhibit 5, the narcotics, on October 18, 1967. The first he learned that he was charged with possession of narcotics was two months later when an agent came to his home and arrested him on the charge of possession of narcotics. (Tr. 108, 109)

Rebuttal testimony for the Government.

Narcotic agent Charles Hill testified he was with Jackson at the time he saw Jackson search the defendant's car and retrieve a manila envelope from the car which contained some white powder on which he saw Jackson conduct a field test on a portion of the powder. (Tr. 130-131)

At trial it was demonstrated to the jury that defendant at the time of his arrest had already been indicted on a different narcotics offense. (Tr. 161-162)

At trial, defense counsel asked arresting agent Charles Hill, "whether or not your office has any custom as to records they keep with reference to where any agent is employed or what he is doing at any time." An objection to such question was sustained.

The attorney appointed to represent indigent defendant first appeared in the cause the day prior to trial.

Reasons Relied on for the Allowance of the Writ

1.

The claim of the unconstitutionality of Section 174, Title 21, U.S. Code, was not waived.

Defendant asserted in the Court of Appeals that the Act upon which he was convicted, Sec. 174, Title 21, U.S. Code was unconstitutional. Reliance was had mainly upon the trio of cases decided by the Supreme Court on January 29, 1968; *Marchetti* v. *United States,* 390 U.S. 39; *Grosso* v. *United States,* 390 U.S. 62; and *Haynes* v. *United States,* 390 U.S. 85, and the granting of certiorari by this Court in *Leary* v. *United States,* 392 U.S. 903, and *United States* v. *Covington,* 393 U.S. 910. The Court of Appeals ruled that the constitutional questions would not be considered by the court because "it is our view that since defendant did not raise the constitutional questions at the trial level, which was the earliest possible date, he is now precluded from doing so." (App. A, p. 3). The court relied on *civil cases* except for *Wong Tai* v. *U. S.,* 273 U.S. 77, where the Supreme Court did consider the unconstitutionality of the section attached. The refusal of the Court of Appeals to consider defendant's assertion that the act was unconstitutional violates this court's holdings in *Grosso* v. *United States,* 390 U.S. 62, *O'Connor* v. *Ohio,* 385 U.S. 92, and *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130.

In *O'Connor* v. *Ohio,* 385 U.S. 92, petitioner's prior request for certiorari had been denied, 382 U.S. 19. Subsequently, the court rendered its decision in *Griffin* v. *California,* 380 U.S. 609. Petitioner raised for the first time in his petition for rehearing, that his rights had been violated in that the prosecutor had commented upon de-

fendant's failure to testify. (382 U.S. 337) This issue had not been raised either at trial or in the state reviewing courts. This Court held that such issue could be raised for the first time in a petition for rehearing on the petition for certiorari and stated:

> "The state does not contest the fact that the prosecutor's remarks violated the constitutional rule announced in *Griffin*. Moreover, it is clear the prospective application of that rule, announced in Tehan v. U.S. ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed. 2d 453, does not prevent petitioner from relying on *Griffin*, since his conviction was not final when the decision in *Griffin* was rendered. Indeed, in *Tehan* we cited our remand of petitioner's case as evidence that *Griffin* applied to all convictions which had not become final on the date of the *Griffin* judgment. 382 U.S., at 409, n. 3, 86 S.Ct., at 461. Thus, the only issue now before us is the permissibility of invoking the Ohio procedural rule to defeat petitioner's meritorious federal claim."
>
> "We hold that in these circumstances the failure to object in the state courts cannot bar the petitioner from asserting this federal right. Recognition of the States' reliance on former decisions of this Court which *Griffin* overruled was one of the principal grounds for the prospective application of the rule of that case. See Tehan v. U. S. ex rel. Shott, 382 U.S. 406, 417, 86 S.Ct. 459, 465, 15 L.Ed.2d 453. Defendants can no more be charged with anticipating the *Griffin* decision than can the States. Petitioner had exhausted his appeals in the Ohio courts and was seeking direct review here when *Griffin* was handed down. Thus, his failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." 385 U.S. 93

In *Curtis* v. *Butts,* 388 U.S. 130, the court also held that a constitutional right not raised at trial can be raised on appeal where it is clear that there was no knowing waiver of such right, and there had been a recent change of the law, due to decisions of the United States Supreme Court.

In *Grosso* v. *United States,* 390 U.S. 62, the Court considered the invalidity of the statute, although such issue was not raised in the trial court. There, this Court stated:

> "Petitioner has not, however, asserted a claim of privilege either as to the counts which charged willful failure to pay the occupational tax, or as to the allegation that he conspired to evade payment of the occupational tax. Given the decisions of this court in Kahriger and Lewis, supra, which were on the books at the time of petitioner's trial, and left untouched by Albertson v. SACB, supra, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege."
>
> • • •
>
> "Since the record is barren of any evidence on which a finding of waiver of the privilege against self-incrimination might properly be predicted, and since, absent such a waiver, reversal of the conviction would be inevitable in light of our holdings today in this case and in Marchetti, we consider that the entire case should now be finally disposed of at this level. In the special circumstances presented, this course seems to us to be dictated by considerations of sound judicial administration, in order to obviate further and entirely unnecessary proceedings below."

Several circuits have held that the constitutional issue respecting the Federal Wagering Tax Act could be raised on appeal, even where the issue was not raised at trial. See *Caglione* v. *United States,* 5 Cir. 396 F.2d 219; *Greenwood* v. *United States,* 4 Cir., 392 F.2d 558; *United States* v.

Manfredonia, 2 Cir. 391 F.2d 229; *Harris* v. *United States,* 8 Cir. 390 F.2d 617.

In the instant case, the decisions of the court in *Grosso, Haynes,* and *Marchetti,* were not rendered until January 29, 1968. Trial here commenced on February 7, 1968. (Tr. 3 of Proceedings 2/7/68.) Considering that those opinions were not published until Feb. 15, 1968 (S.Ct. Rep.) or Feb. 26, 1968 (L.ed.2d Repts.) and that certiorari was not granted in *Leary* until after the trial in the instant case, under this court's holdings in *Grosso, O'Connor,* and *Curtis, supra,* it cannot be asserted that there was a knowing waiver of defendant's constitutional right.

Starting with *Johnson* v. *Zerbst,* 304 U.S. 458, this court has in numerous decisions, *Henry* v. *Mississippi,* 379 U.S. 442, *Fay* v. *Noia,* 372 U.S. 391 and *Brookhart* v. *Janis,* 384 U.S. 1, developed the rule that appointed counsel cannot, unless as part of trial strategy, waive constitutional rights of the indigent defendant without the knowing acquiescence of the indigent defendant. Under the facts of the instant case, where counsel for defendant first appeared in the case a day before trial, and relevant recent decisions of the United States Supreme Court had not been published, the record does not support the finding that the indigent defendant waived his objection to the unconstitutionality of the Act under which he was convicted.

2.

The Act under which defendant was convicted is unconstitutional.

Defendant was charged with receiving, concealing, buying, selling and facilitating the transportation of 23.775 grams of heroin after it had been imported into the United

States contrary to law, he knowing that the said narcotic drug had been so imported and brought into this country contrary to law in violation of Sec. 174, Title 21, U.S. Code.

That statute reads:

> "Whoever fraudulently or knowingly imports or brings in any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be [punished] . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

This statute is unconstitutional as violative of defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. In accordance with the statute, the court instructed the jury as follows:

> "By reason of this statute I charge you if the evidence in this case shows beyond a reasonable doubt that the defendant knowingly had possession of the narcotic drug as charged, *then it is not necessary for the government to prove that the drug was imported or brought into the United States contrary to law or that the defendant knew that the drug was imported or brought into the United States contrary to law.* The defendant's possession alone raises a presumption that the narcotic drug was so unlawfully imported and that the defendant had knowledge of that fact and the burden is on the defendant to rebut the presumption to your satisfaction." (Tr. 212-213). (Emphasis added).

Although heretofore the constitutionality of the presumptive feature of the act has been upheld, *Yee Hem* v. *United States,* 268 U.S. 178 (1925), 69 L.Ed. 2nd 904, the effectiveness of that holding has now been put in question by recent decisions of this Court in a series of cases: *United States* v. *Jackson,* 390 U.S. 570 (1968), *Griffin* v. *California,* 380 U.S. 609 (1965), *Marchetti* v. *United States,* 390 U.S. 39 (1968), *Grosso* v. *United States,* 390 U.S. 62 (1968) and *Haynes* v. *United States,* 390 U.S. 85 (1968).

In *Jackson,* the court struck down the death penalty feature of the Federal Kidnapping Act, 18 U.S.C. sec. 1201(a) because it made the "risk of death" the price for asserting the right to jury trial and thereby impaired the free exercise of defendant's constituted right under the Sixth Amendment.

In *Griffin,* the court held a California conviction to have violated the self-incrimination feature of the Fifth Amendment when a State Statute permitted prosecution commentary on defendant's failure to explain or deny by his testimony any evidence or facts in the case against him and that such failure may be considered by the jury in evaluating the evidence.

In *Marchetti,* the court decided that a proper claim of the privilege against self-incrimination precluded a conviction of violation of Title 26, U.S. Code, Secs. 4411, 4412, the occupational tax on wagering and related registration requirements.

In *Grosso,* the court held that a failure to waive the constitutional right against self-incrimination voided conviction for violation of Title 28, U.S. Code, Sec. 4401, the wagering tax, and Title 26, U.S. Code, Sec. 4411.

In *Haynes,* the court held that a proper invocation of the privilege under the Fifth Amendment prevented prosecution for violation of Title 26, U.S. Code, Sec. 5841, failure to register a firearm and Title 26, U.S. Code, Sec. 5851, possession of unregistered firearm.

A reading of the above cases demonstrates that the Act here in question is unconstitutional. As a matter of fact, in his dissenting opinion in *Marchetti* and *Grosso,* 390 U.S. 83-84, Mr. Chief Justice Warren recognized the application of the above mentioned cases upon the legality of the narcotic laws. For, in dissenting, the Chief Justice stated:

> "I apprehend that the Court, by unnecessarily sweeping within its constitutional holding the registration requirements of Sec. 4412 [Title 26, USC] is opening the door to a new wave of attacks on a number of federal registration statutes whenever the registration requirement touches upon allegedly illegal activities. As I noted above, registration is a common feature attached to a number of special taxes imposed by Title 26. For example, the following provisions impose special registration requirements: . . . Sec. 4722 (those engaged in dealing in narcotic drugs); Sec. 4753 (those who deal in marijuana); . . .
>
> The implications of the Court's decisions today also extend beyond the tax statutes. For example, the statute requiring narcotic addicts and violators to register whenever they enter or leave the country, 18 USC Sec. 1407, can now be expected to come under attack. My concern that such registration requirements will now come under attack is not imaginary. This very day, the Court, adhering to its decisions in *Marchetti* and *Grosso,* declares unconstitutional in *Haynes* v. *United States,* 390 U.S. 85, 19 L.Ed.2d 923, 88 S.Ct. 722, 26 USC Sec. 5851, which makes unlawful the possession of a firearm not registered under Sec. 5841."

A similar issue as to the constitutionality of Title 21, U.S. Code, Sec. 174 is now before this Court in its grant of certiorari on June 10, 1968 in *Leary* v. *United States,* 392 U.S. 903. Certiorari was granted to review the constitutionality of Title 21, U.S. Code, Sec. 176a (as well as 26 U.S.C. Secs. 4741(a), 4742 and 4744(a) in the light of the three decisions set out heretofore.[3] Leary's conviction stems from a trial in a Texas District Court. The validity of the presumptive feature of a statute similar to the one here at bar was passed on adversely to him in *Leary* v. *United States,* 5 Cir., 383 F.2d 851 (1967).

But the Fifth Circuit did not have the benefit of the *Marchetti, Grosso* and *Haynes* cases.

Under Section 174, Title 21, U.S. Code, the government must prove that the narcotic drug was imported into the United States and that defendant knew of such importation. Requiring defendant to "explain the possession to the satisfaction of the jury" i.e. to prove lack of importation or

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[3] The grant of certiorari included the following questions presented in the petition:

"I. Whether the registration and tax provisions in 26 U.S.C. Sections 4741(a), 4742 and 4744(a), as applied to Petitioner, violate his privilege against self incrimination protected by the Fifth Amendment to the United States Constitution and his rights thereunder as amplified by this Court in three recently decided cases: *Marchetti* v. *United States,* 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); *Grosso* v. *United States,* 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968); and *Haynes* v. *United States,* 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968).

"IV. Whether Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana solely from possession thereof."

lack of knowledge of importation, forces defendant to admit possession. Requiring defendant to admit possession violated defendant's constitutional rights against self-incrimination because possession in itself, without proof of importation or knowledge of importation, is a felony under Illinois state law. Sec. 22-3, Chap. 38, Ill. Rev. Stat. 1967.

If a defendant in a federal trial must admit possession, his defense being lack of knowledge of importation or failure of the government to prove importation, he would be making a judicial confession to a felony under state law. Nor would an acquittal in the federal trial bar successful prosecution in the state courts. *Bartkus* v. *Illinois,* 359 U.S. 121. The presumptive feature of Sec. 174, Title 21, U.S. Code violates defendant's constitutional right against incriminating himself in the identical manner as those provisions held in *Haynes, Grosso,* and *Marchetti, supra.*

The comments by Justices Black and Douglas in their separate dissenting opinions in *United States* v. *Gainey,* 380 U.S. 63 (1965) are pertinent as indicative of the invalidity of the statute herein.

In discussing the effect of presumption of guilt from unexplained presence at a still, Mr. Justice Black stated, 380 U.S. 87-88:

> "The undoubted practical effect of letting guilt rest on unexplained presence alone is to force a defendant to come forward and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion, which I think runs counter to the Fifth Amendment's purpose to forbid convictions on compelled testimony. The compulsion here is of course more subtle and less cruel physically than compulsion by torture, but it is nonetheless compulsion and it is nonetheless effec-

tive. I am aware that this Court in *Yee Hem* v. *United States,* 268 US 178, 185, 69 L ed 904, 906, 45 S Ct 470, held that use of a presumptive squeeze like this one did not amount of a form of compulsion forbidden by the Fifth Amendment. The Court's reasoning was contained in a single paragraph, the central argument of which was that despite a presumption like this a defendant is left 'entirely free to testify or not as he chooses'. That argument, it seems to me, would also justify admitting in evidence a confession extorted by a policeman's pointing a gun at the head of an accused, on the theory that the man being threatened was entirely free to confess or not, as he chose. I thing the holding in *Yee Hem* is completely out of harmony with the Fifth Amendment's prohibition against compulsory self-incrimination, and I would overrule it."

Mr. Justice Douglas, in dissenting stated, in *Gainey,* 380 U.S. 72-74:

"In my view, the acute danger in the statute as construed and applied lurks in its provision that the jury may draw the inference in question 'unless *the defendant explains* such presence to the satisfaction of the jury . . .' (Emphasis supplied). If this meant that the judge should instruct that the inference may be drawn unless the defendant himself becomes a witness and personally explains his presence at the still, then, as my Brother Black says, the statute would clearly subject the defendant to an impermissible compulsion to testify. But more subtly compelling instructions than that are outlawed by the same policy. It has long been the rule in the federal courts that the defendant's failure to testify ought not to be even the subject of unfavorable comment:

> 'It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain

> transactions of a suspicious character, and offences against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudicies against him. . . . (C)ounsel is forbidden by the statute (now 18 USC Sec. 3481) to make any comment which would create or tend to create a presumption against the defendant from his failure to testify.' *Wilson* v. *United States*, 149 US 60, 66-67, 37 L ed 650, 651, 652, 13 S Ct 765.

"Just as it is improper for counsel to argue from the defendant's silence, so is it improper for the trial judge to call attention to the fact of defendant's silence. Indeed, under 18 USC & 3481 the defendant is entitled as a matter of right to have the trial judge expressly tell the jury that it must not attach any importance to the defendant's failure to testify; or, if the defendant sees fit, he may choose to have no mention made of his silence by anyone. *Bruno* v. *United States*, 308 US 287, 84 L ed 257, 60 S Ct 198.

"I have previously expressed my view that this rule against comment on the defendant's silence is mandated by the Fifth Amendment, because '(u)sing a defendant's silence as evidence against him is one way of having him testify against himself.' (*Scott* v. *California*, 364 US 471, 472, 5 L ed 2d 222, 81 S Ct 245 (dissenting opinion).

"The charge in the present case does not, in my view, satisfy the requirements of the Fifth Amendment. The judge told the jury that the inference could be drawn 'unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury.' I believe the charge in that form runs counter to the federal policy that forbids conviction on compelled testimony, not only because, as my Brother Black points out, it puts direct pressure on the defendant to come forward

and testify, but also because it amounts in practical effect to an improper comment on the defendant's silence where, as here, he resists the pressure and does not take the stand in his own behalf. Unlike the Court, therefore, I would not interpret the statute before us as attempting a pro tanto repeal of 18 USC Sec. 3481 by authorizing such as instruction."

And recently, in *Spevack* v. *Klein,* 385 U.S. 511 (1967), in reversing a New York decision disbarring a member of the bar for failure to produce certain records at a judicial inquiry, the Supreme Court stated, p. 515: "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin* v. *California,* 380 U.S. 609, 14 L ed 106, 85 S Ct 1229, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'. Id. at 614, 14 L ed 2d at 109. We held in that the case that the Fifth Amendment, operating through the Fourteenth, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Id., at 615, 14 L ed 2d at 110."

Accordingly, we submit that the presumptive feature of Section 174, Title 21 U. S. Code is unconstitutional.

3.

Petitioner was deprived of the effective assistance of counsel.

The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from

its denial. *Glasser* v. *United States,* 315 U.S. 60, 76. Petitioner was denied effective assistance of counsel.

Attorney Antonio M. Gassaway was appointed by the court as counsel for the defendant on January 9, 1968. The defendant was arraigned the next day, at which time the cause was set for trial on January 25, 1968, a mere 15 days later. (Tr. H.[4] 12) Appointed counsel's participation in the cause consisted of his appearance in court on January 25, 1968, when the case was continued to February 5, and again on February 5 when the case was continued to February 6, 1968. No motions of any kind were filed.

Appointed counsel's next contribution to the defense was his withdrawal from the case because of his engagement in another matter (Tr. H. 21-22) and his statement that his associate, Mr. Charles Durham, would substitute for him. Mr. Durham, who was Mr. Gassaway's partner (Tr. H. 21), first appeared in the case at 2:00 P.M. on February 6, 1968 and advised the court that he would replace Mr. Gassaway and that he would be ready to try the case on the morning of February 7, 1968. (Tr. H. 25) Mr. Durham presented no pretrial motions of any kind, either.

The defendant should have had the benefit of a pretrial motion to suppress the evidence based on *Preston* v. *United States,* 376 U.S. 364, 367 (1964) and *United States* v. *Nikrasch,* 7 Cir., 367 F.2d 740 (1966) and *United States* v. *Harvey,* 397 F.2d 526. At trial agent Jackson testified that he approached the defendant's car, which was parked at the rear of defendant's home, with his gun drawn and ordered Hoskins out of the car. Hoskins was placed under arrest in the presence of other agents. Then, and only then was the car searched, according to agent Jackson, and

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[4] "Tr. H." refers to Transcript of Hearing.

the alleged narcotics which is the subject of the indictment discovered.[5] Thus, it might have been shown that there was no reason for a search of the car because Hoskins was out of the car and in custody of at least three agents with drawn guns. (Tr. 8)

It may be that the brevity of time the actual trial counsel had in which to prepare his case necessarily contributed to his obvious lack of preparation. For example, defense counsel presented only two requests for instructions, designated as A and B. (Tr. 148) When the government objected to tendered instruction A relating to impeachment, and when defense counsel asked leave to present an instruction in different wording, the court stated, "You sent in at the last moment these two requests. I will charge the jury as carefully as I know how to do it." (Tr. 150) One wonders at what earlier time defense counsel could have prepared instructions when he first filed his appearance in the case the day before the trial. (Tr. H. 25) Subsequently

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[5] One of the strangest aspects of this case is the failure of the agents to place any charge against the defendant on the night of his arrest. The incident which is the subject matter of this indictment occurred on October 18, 1967. (R.* 3) Although arrested and taken to the Bureau of Narcotics, defendant was not charged with the offense until two months later when the indictment was returned on December 19, 1967. (R. 3) At a preliminary hearing on a motion to suppress the evidence, considerable latitude might have been allowed by the court in ascertaining reasons for this—to say the least—unusual delay. Facts might have been uncovered at the evidentiary hearing to throw doubt upon the entirety of the proceedings. We can only speculate about this, because court-appointed counsel was negligent in failing to protect the rights of his indigent client.

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* "R" refers to Record.

defense counsel withdrew his tendered instruction B (Tr. 151); and accordingly, no defense instructions were, in effect, tendered by counsel.

It is even apparent from the record that the last-minute-substituted counsel had not conferred sufficiently with his client before the trial. When the government rested its case on the morning of February 8, 1968 (Tr. 72), Mr. Durham requested an adjournment and stated, "Your Honor, in view of the developments in this case, I think I would request at this time a recess so that I can go over the situation with the defendant and make some suggestions to him and talk to him about this matter." (Tr. 74) The court allowed a recess for thirty minutes after which the trial resumed. (Tr. 74)

Because this accusation is so serious and the possibility of punishment so great (defendant received a ten year sentence) counsel should have insisted on a longer time for preparation of the case. See *United States* v. *Mitchell,* 2 Cir., 354 F.2d 767 (1966), where the court stated in reversing, p. 769:

> "Moreover, a reasonable time was required for counsel to familiarize himself with the various intricacies of the Selective Service law and to decide upon the proper strategy to be followed at the trial in order, if possible, to obtain an acquittal, or to make a record for purposes of appeal or to obtain as light a sentence as the circumstances might warrant."

Not only was the first appointed counsel unprepared for the case because he was otherwise engaged (Tr. H. 21), but apparently the last-minute-substitute counsel also was rushed for time because he had some personal engagement out of town. He asked permission to be absent from taking the verdict because of that. (Tr. 155) The court reminded Mr. Durham, "I didn't press you to get into this case. You

pressed me very hard to get into this case. You took bread out of the mouth of Mr. Gassaway." Whereupon Mr. Durham answered that Mr. Gassaway was his partner. (Tr. 157)

Nor was appointed counsel diligent after verdict. He announced "I will file post-trial motions in accordance with the rules." (Tr. H. 3) Apparently lack of time or disinterest prevented him from doing so. Neither a motion for a new trial nor one in arrest of judgment was filed.

In *Anders* v. *California,* 386 U.S. 739, the court held that effective assistance of counsel requires more than just the appointment of counsel. The Constitution requires that counsel be an advocate. In *Anders* the court said, "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client." Being an advocate involves more than just sitting through a trial and making appropriate motions and objections.

Nor were appropriate motions and objections made by counsel. The Court of Appeals applied the waiver theory to the three assertions of defendant is discussed, because of inaction by appointed counsel.

Advocacy did not occur in the instant case. Nor could it, where counsel who tried the case, (1) appeared for the first time, less than 24 hours before trial, and (2) had urgent personal matters requiring him to leave the city. (Tr. 155) In *United States* v. *Koplin,* 7th Cir., 227 F.2d 80, the court reversed stating "the fact that McDonald was given forty-eight hours (including Armistice Day) to prepare for trial—reduced his appointment to nothing more than a mere formality."

It is evident that appointed counsel did not sufficiently consult with his client or prepare his case. He was not an advocate for defendant as required by the Sixth Amendment of the United States Constitution.

4.

Defendant was denied a fair trial because the government introduced evidence that defendant was under indictment for other crimes.

The law is clear that it is prejudicial error to present to a jury that defendant has been indicted for other crimes. Evidence of other indictments, arrests, or convictions are improper, because they cause the jury to believe that defendant has a propensity for crime. "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge" *Michelson* v. *United States,* 335 U.S. 469, 475-6.

The jury was advised at the outset that the defendant was being arrested for violation of the federal narcotic laws (Tr. 8) even before any narcotics were allegedly found in defendant's car. The prejudice to defendant was irremediable.

The government agent also improperly presented evidence that defendant was under indictment, for a different offense. Upon cross-examination, the arresting officer

stated, "I was there to arrest him pursuant to an indictment and a warrant" (Tr. 37).

In *United States* v. *Rinaldi,* 2 Cir., 301 F. 2d 576 (1962), improper evidence of defendant's criminal record was presented to the jury. The trial court instructed the jury to disregard such evidence as follows, (p. 578):

> "I want to instruct the jury that you must make a conscientious and serious effort to reject from your minds the question and answer which this woman gave to the District Attorney's inquiry."

The Court of Appeals reversed, stating:

> "Cautionary instructions will not cure the error. *Marshall* v. *United States,* 360 U.S. 310 (1959)"

Considering that in *Rinaldi* the jury was specifically and at length directed to disregard the prejudicial and improper evidence of defendant's criminal record, and such instruction was insufficient to cure the clear prejudice here, where the court only stated "I will strike the witness' answer to the question", (Tr. 38) the error was not cured.

The inability of an instruction to cure error caused by presenting evidence of defendant's criminal record, has been accepted in *United States* v. *Reed,* 7 Cir., 376 F.2d 226 (1967). There the court found that evidence of defendant's criminal record was presented to the jury. The court stated "We hold that the testimony with respect to the 'mug shot' of Reed taken in prison vitiated his right to be presumed innocent until proven guilty and was prejudicial error."

Moreover, if the jury had been able to wash out from its mind the evidence of defendant's criminal record, the prosecutor, in his final argument, made sure that their memory was refreshed. He argued that either agent Jackson or defendant Hoskins opened the car and that Jackson put his gun on Hoskins and said, "You're under arrest; you have been indicted and I am here to arrest you." (Tr. 161-2).

The Court of Appeals rejected defendant's contention, asserting that "evidence of other crimes is admissible when it is so blended or connected with the one on trial that proof of one incidently involves the other" citing *United States* v. *McCartney,* 264 F.2d 628 (7th Cir.) and *United States* v. *Levine,* 372 F.2d 70 (7th Cir.). (App. A, p. 6). The court also stated that the reference of other crimes did not involve "a situation where the evidence of prior crimes was clearly offered to show the defendant's bad character or the probability of his guilt." (App. A, p. 6).

The cases relied upon by the court are totally inapplicable. In those cases an essential part of the government's evidence, required presenting facts which demonstrated defendant's involvement in other crimes. Not true in the instant case. Trial counsel did not challenge the constitutionality of the arrest or the search. Why defendant was arrested was not relevant to the government's case.

Improper admission of evidence of defendant's criminal record is so prejudicial that it can not be considered harmless error. In *Sumrall* v. *United States,* 5 Cir., 360 F.2d 311 (1966), the court stated, (p. 314):

> "We are, of course, loathe to reverse a case like this in the face of overwhelming evidence of guilt. Technical niceties such as these make the law appear ridicu-

> lous to the man on the street. But, 'All law is technical if viewed only from concern for punishing crime without heeding the mode by which it is accomplished.' *I.e.* see Mr. Justice Frankfurter in *Bollenbach* v. *United States,* 326 U.S. 607, 614, 66 S.Ct. 402, 90 L.Ed. 350. In circumstances like these the question is not whether the appellants have been proven guilty, but whether guilt has been established according to the procedural safeguards to insure trial before a fair and unprejudiced jury. It is not enough to be able to say that the evidence is entirely sufficient to convict without reference to prior records of appellants and that the jury would have in all probability returned a verdict of guilty without such knowledge. The questions we must decide is whether the jury was more prone to convict these appellants knowing they had previous records than without such knowledge. In other words, can we say with reasonable certainty that the reference to prior records 'had but very slight effect on the verdict of the jury'? We cannot so say, and the cases must, therefore, be reversed."

The opinion in *Sumrall* is based on this court's holding in *Chapman* v. *California,* 386 U.S. 18. There the court stated:

> "... Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." (386 U.S. 18, at 24)

Evidence of other crimes is highly prejudicial. Under the rationale of *Chapman* v. *California, supra,* prior to admitting such evidence under the exception relied upon by the Court of Appeals, the government should have the

burden of proving beyond all reasonable doubt, that the admission of such objectional evidence was necessary and essential and so blended or connected with the case on trial that proof of one incidentally involves proof of the other. Neither the government in its brief nor the court in its opinion was able to so demonstrate.

Nor is the denial of defendant's right to a fair trial diminished if such prejudicial evidence is not purposely "clearly offered to show the defendant's bad character or the probability of guilt." The damage is done and prejudicial error occurs even if the jury is presented such evidence accidently. *United States* v. *Reed,* 376 F.2d 226, *United States* v. *Sumrall,* 360 F.2d 311; *Leonard* v. *United States,* 378 U.S. 544.

The admission of prejudicial evidence of petitioner's being under indictment[6] for a narcotic charge denied defendant's constitutional right to a fair trial.

5.

The court's instructions were erroneous in advising the jury that the government need not prove that the narcotics were imported into the United States.

A jury must be advised of the essential elements of the crime, otherwise any guilty verdict is void. *Screws* v. *United States,* 326 U.S. 91, 107 (1945):

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion."

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[6] On this charge, petitioner was acquitted by a jury in the District Court in Chicago on December 24, 1968. Thus, no evidence of any other crime was ever shown against him.

The trial court instructed the jury as to the three essential elements required to be proved:

> "First, the act or acts of concealing or in any manner facilitating the concealment or transportation of the narcotic drug as alleged, which narcotic drug has been imported or brought into the United States contrary to law as charged; second, doing such act or acts with knowledge that the narcotic drug has been imported or brought into the United States contrary to law; and, third, doing such act or acts knowingly, unlawfully and fraudulently." (Tr. 210, 211)

But then the court told the jury that it was *not* necessary for the government to prove one of the essential elements, for the court advised the jury, in the language of the statute (21 USC 174), that whenever a defendant is shown to have had possession of a narcotic that "such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

And then the court stated:

> "By reason of this statute I charge you if the evidence in this case shows beyond a reasonable doubt that the defendant knowingly had possession of the narcotic drug as charged, *then it is not necessary for the government to prove that the drug was imported or brought into the United States contrary to law or that the defendant knew that the drug was imported or brought into the United States contrary to law.* The defendant's possession alone raises a presumption that the narcotic drug was so unlawfully imported and that the defendant had knowledge of that fact and the burden is on the defendant to rebut the presumption to your satisfaction." (Tr. 212-213). (Emphasis added).

The vice of that instruction is that it tells the jury the government need not prove what the law affirmatively requires it to prove.

A somewhat similar series of instructions was held erroneous and of dubious constitutionality and a conviction therefore reversed in *United States* v. *Peeples,* 2 Cir., 377 F.2d 205 (1967).

In the case at bar the court instructed the jury that if it was shown that defendant had possession of the drug ". . . then it is not necessary for the government to prove that the drug was imported or brought into the United States contrary to law or that the defendant knew that the drug was imported." (Tr. 212) But this is precisely what the government must prove.

As the Second Circuit stated in *Peeples,* p. 209:

> "However, if the jury is instructed to consider proof of possession as conclusive proof of guilt rather than as merely proof from which to draw permissible inferences in order to find from that proven fact the two remaining essential facts that must be proven in order to establish the commission of the offense, the statute would be misconstrued into creating a new federal crime of possession which might be of dubious constitutionality. (Citing cases) . . . There was serious and prejudicial error in the instructions given by the court below."

And as though in further criticism of the trial court in this case, the Second Circuit stated, p. 211:

> "Furthermore, this charge, which left the jurors with the impression that they should infer that the defendant had knowledge of unlawful importation from the fact of his possession improperly destroyed the government's burden of proving defendant guilty beyond a reasonable doubt by requiring the defendant to assume

the burden of persuasion on the issue of guilty knowledge. See *Na Choy Fong* v. *United States*, 245 F. 305, 307 (9 Cir. 1917), cert. denied, 245 U.S. 669, 38 S.Ct. 190, 62 L.Ed. 539 (1918). The defendant need not persuade the jury of his lack of knowledge, Williams, Burdens and Presumptions in Criminal Law, 212 L.T. 211, 212-13 (1951); to the contrary, the prosecution retains the burden of establishing all the elements of the crime beyond a reasonable doubt, including knowledge, see 111 U.Pa.L.Rev. 903, 904 (1962). If the explanation of the accused, or evidence of other circumstances creates a reasonable doubt in the minds of the jury as to defendant's knowledge of importation, the jury must acquit, regardless of defendant's possession, and should have been so instructed."

Where a defendant appears before the jury under the extremely difficult straits in which the defendant found himself (the jury having been advised that he was under another narcotic indictment (Tr. 197), the burden of the government to prove the essential elements should not be shifted to the defendant to disprove them.

The Seventh Circuit did not distinguish *Peeples*. It did, however, hold that petitioner is precluded from raising the point because his counsel did not object. (App. A, p. 5).

6.

Defendant was denied his right to confront witnesses in that he was limited in his right to ascertain the existence of Jencks Act statements.

Federal agent Charles Hill was one of the arresting officers. During cross examination, he testified, "I know that my supervisors knew that I was out there. I was in radio communication with my office throughout the day. I was also in contact with agent Smith who was my

partner, and on occasion throughout the afternoon I was in visual sight of the other agents, agent Jackson." (Tr. 139).

He was then asked, "whether or not your office has any custom as to records they keep with reference to where any agent is employed or what he is doing at any given time." (Tr. 139). An objection to this question was sustained.

Under the provisions of the "Jencks Act" Title 18, USC, sec. 3500, the defense would have had the right to any record of the officer's conversations with his superiors. Section 3500 (e) (2) defines the statements which must be supplied defense counsel as follows: "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement."

Clearly, if agent Hill's supervisors recorded, either electrically or by transcription, his reports on Oct. 18, 1967, defense counsel would have a right to such. *Palermo* v. *United States,* 360 U.S. 343 (1959), *Campbell* v. *United States,* 373 U.S. 487 (1963), *Williams* v. *United States,* D.C. Cir., 338 F. 2d 286 (1964).

A requisite to demanding any such statements, would be to prove their existence. The question propounded by defense counsel was a proper method to determine whether there existed any reports to which counsel had a right under 18 U.S.C. 3500. Sustaining an objection to such question, thereby, was equivalent to denying a defense request for the production of the statement. Denying defendant a Jencks Act Statement impairs defendant's

ability to cross examination, thereby violating his constitutional right to confront his accusors. *Pointer* v. *Texas*, 380 U.S. 400.

CONCLUSION

For the foregoing reasons, we pray that the Petition for Certiorari be granted and that this court either remand the cause to the Court of Appeals for the Seventh Circuit for a consideration of the points set out herein, or that this court note the errors and make known its rulings thereon.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 SEPTEMBER SESSION, 1968

No. 16830
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JESSE HOSKINS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 8, 1969

Before HASTINGS, SWYGERT and KERNER, *Circuit Judges.*

SWYGERT, *Circuit Judge.* The defendant, Jesse Hoskins, appeals his conviction and sentence for violation of the federal narcotics laws relating to the possession of heroin, under 21 U.S.C. § 174. The evidence, viewed in a light most favorable to the Government, shows that on the night of October 18, 1967 Federal Narcotics agent Carl Jackson and an Illinois state inspector, John Karstan, were driving on the south side of Chicago near 82d and Peoria Street. After rendezvousing with federal agents Charles Hill and Richard Smith, the four agents observed the defendant turn his car into an alley and park behind his home at 8211 Peoria Street. Relying on the fact that there was a warrant on file for the defendant's

arrest, agents Jackson and Karstan drove up behind the defendant's car. According to Jackson's testimony, as he and Karstan left their car and approached the defendant's car, the defendant reached underneath the seat and appeared to place something there. The agents went to the car, opened the doors, asked the defendant to get out of the car, and placed him under arrest for the narcotics charge which was the basis of the prior warrant.

As the defendant exited from the car, agent Jackson inquired what the defendant had placed underneath the seat. The defendant denied putting anything there. Agent Jackson reached under the seat and discovered a small manilla envelope containing white powder. This white powder proved to be heroin. The principal theory of the defense at trial was that the manilla envelope containing heroin was secreted by agent Jackson in the defendant's automobile at the time of arrest.

Numerous errors are assigned in this appeal: the unconstitutionality of the statute upon which the defendant was convicted, an erroneous jury instruction outlining the elements of the crime, ineffective assistance of counsel, introduction into evidence of the fact that the defendant was under indictment for other crimes, limitation of cross-examination, and the impropriety of the sentencing procedure. Although some of these assignments of error border on the frivolous, others do require discussion.

The most vigorously asserted argument is that the statute under which the defendant was convicted is unconstitutional. Specifically, the defendant attacks the presumptive feature of section 174 which provides that:

> Whenever on trial for violation of this section the defendant is shown to have or to have had possession

> of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

It is urged that this presumption is a violation of the defendant's rights under the fifth, sixth and fourteenth amendments. Although the defendant concedes that the precise question he raises has been previously decided adversely to him in *Yee Hem* v. *United States,* 268 U.S. 178 (1925),[1] he nonetheless maintains that *United States* v. *Jackson,* 390 U.S. 570 (1968), *Griffin* v. *California,* 380 U.S. 609 (1965), and the self-incrimination trilogy *Marchetti* v. *United States,* 390 U.S. 39 (1968), *Grosso* v. *United States,* 390 U.S. 62 (1968), and *Haynes* v. *United States,* 390 U.S. 85 (1968) have *sub silentio* put into question the *Yee Hem* holding. In spite of the fact that it is interesting to note that the Supreme Court in none of the latter cases specifically addressed itself to the presumptive features contained in the statutes there in issue, it is not necessary for us to reach this constitutional question because it is our view that since the defendant did not raise the constitutional issue here presented at the trial level, which was the earliest possible occasion, he is now precluded from doing so.

That constitutional questions which are nonjurisdictional must be asserted at trial to preserve them for appeal is a well settled doctrine in the Supreme Court,[2]

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[1] But see *United States* v. *Gainey,* 380 U.S. 63 (1965) (Black & Douglas, JJ., dissenting).

[2] *Wong Tai* v. *United States,* 273 U.S. 77 (1927); *Head* v. *New Mexico Board,* 374 U.S. 424, 432 n. 12 (1963); *Glidden Co.* v. *Zdanok,* 370 U.S. 530 (1962).

this circuit as well as many other circuits.[3] For example, in *Morgano* v. *Pilliod*, 299 F.2d 217, 219 (7th Cir.), *cert. denied*, 370 U.S. 924 (1962), in response to the Government's contention that the court could not consider the appellant's claim that 8 U.S.C. § 1251(a)(4) was unconstitutional because the point was not raised below, this court, in reliance on the decision in *Wong Tai* v. *United States*, 273 U.S. 77 (1927) stated: "We would be justified in refusing to consider the question of constitutionality of . . . [the statute] because the appellant has raised that question for the first time on appeal." 299 F.2d at 219.

Waiver of the defendant's right to assert this constitutional argument likewise requires that this court not consider the defendant's suggestion that we should withhold determination in this case pending the Supreme Court's decision in *Leary* v. *United States*, 383 F.2d 851 (5th Cir. 1967), *cert. granted*, 392 U.S. 903 (1968), and *United States* v. *Covington*, 282 F.Supp. 886 (S.D. Ohio), *prob juris. noted*, 37 U.S.L.W. 3151 (U.S. Oct. 21, 1968) (No. 366). The defendant contends that the "precise issue" of section 174's constitutionality, that is, whether there is a rational connection between the fact proved (defendant's possession of the narcotic drug) and the ultimate fact presumed (the illegal importation of the heroin and defendant's knowledge of this illegal importation is before the Court in *Leary* and *Covington*. To meet this argument the Government points out that the

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[3] *Wabash Ry. Co.* v. *St. Louis*, 64 F.2d 921 (8th Cir. 1933); *Keyes* v. *Madsen*, 179 F.2d 40 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 928 (1950); *Evangelical Lutheran Church* v. *Stanolind Oil & Gas Co.*, 251 F.2d 412 (8th Cir. 1958); *Rubin* v. *United States*, 289 F.2d 195 (5th Cir. 1961); *Werner* v. *Hearst Publishing Co.*, 297 F.2d 145 (9th Cir. 1961); *Cox* v. *City of Freeman*, 321 F.2d 887 (8th Cir. 1963).

Court's review in the two cases is limited to the question of the factual basis of the presumption contained in the marijuana statute, 21 U.S.C. § 176a, and the fifth amendment ramifications of the registration and tax provisions of 26 U.S.C. §§ 4741(a), 4742. We need not consider these contentions or their implications in light of the ruling in *Pilliod.*

The second alleged error is that the district court's instructions were erroneous in that they advised "the jury that the government need not prove that the narcotics were imported into the United States." This argument is not only without merit in light of this court's standard of jury instruction review set forth in *United States* v. *Phillips,* 217 F.2d 435, 443 (7th Cir. 1954), and *United States* v. *Schwartz,* 398 F.2d 464, 469 (7th Cir. 1968), but also it is an assignment of error which the defendant is precluded from asserting on review in light of the fact that the challenged instruction was never objected to at trial. This latter conclusion is based on *Fed.R.Crim.P.* 30 which in part provides: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Another error asserted by the defendant is that he was "denied a fair trial because the government introduced evidence" that he "was under indictment for other crimes." The cases cited by the defendant, such as *Michelson* v. *United States,* 335 U.S. 469 (1948), are inapplicable to the facts before us. There are well established exceptions to the general rule that evidence of other crimes is inadmissible. One of the exceptions which has been invoked by this Court is that the evidence of other crimes

is admissible when it is so blended or connected with the one on trial that proof of one incidentally involves the other. *United States* v. *McCartney,* 264 F.2d 628 (7th Cir.), *cert. denied,* 361 U.S. 845 (1959); *United States* v. *Levine,* 372 F.2d 70 (7th Cir.), *cert. denied,* 388 U.S. 916 (1967). The evidence complained of by the defendant on appeal is the testimony of agent Jackson regarding a conversation he had with the defendant at the time of his arrest. Without objection Jackson testified: "I told him [the defendant] he was under arrest for violation of the Federal Narcotics laws, that there was a warrant on file for his arrest, identified myself. . . ." The other reference to the warrant for another crime was made in the Government's opening statement: "[S]ome agents of the Federal Bureau of Investigation knowing that legal process existed for the arrest of the defendant. . . ." Neither of these references involves a situation where the evidence of prior crimes was clearly offered to show the defendant's bad character or the probability of his guilt.

We have considered the other contentions made by the defendant and find them to be without merit.

The judgment of conviction is affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

February 7, 1969

Before

Hon. JOHN S. HASTINGS, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

Hon. OTTO KERNER, *Circuit Judge*

No. 16830
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JESSE HOSKINS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing filed in the above-entitled cause be and the same is hereby denied.